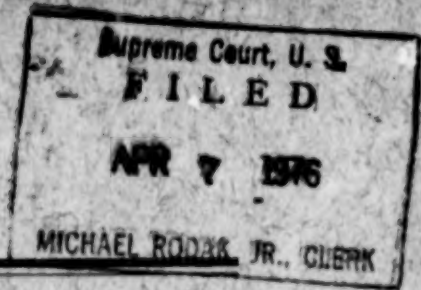


No. 75-978



In the Supreme Court of the United States

OCTOBER TERM, 1975

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL., PETITIONERS

v.

**RUSSELL E. TRAIN, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENTS

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Respondents agree that the Court should grant the petition for a writ of certiorari in this case.

1. This case began when petitioners, who are eight chemical manufacturers,¹ sued in the United States District Court for the Western District of Virginia, challenging regulations promulgated by the Administrator of the Environmental Protection Agency (EPA). The chal-

¹E. I. du Pont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, the Dow Chemical Company, Allied Chemical Corporation, and Hercules Incorporated.

lenged regulations,² issued on March 12, 1974, under the Federal Water Pollution Control Act as amended in 1972, 86 Stat. 47, 33 U.S.C. (Supp. IV) 1251, *et seq.*, related to effluent discharges from plants manufacturing sulfuric acid.

Petitioners claimed that the regulations were invalid because they did not constitute effluent limitation guidelines³ under Section 304(b) of the Act (33 U.S.C. (Supp. IV) 1314(b)),⁴ but were instead effluent limitations. Petitioners further contended that the EPA Administrator had no authority to promulgate effluent limitations, that Section 301(b) (33 U.S.C. (Supp. IV) 1311(b)) gave him no authority to set uniform national effluent limitations, and that such limitations must be prescribed on a plant-by-plant basis in the discharge permits issued by the State (or the EPA regional office) under Section 402 of the Act (33 U.S.C. (Supp. IV) 1342).⁵

In light of their interpretation of the Act, petitioners argued that the proper forum for initial review of the

²40 C.F.R. Part 415 (Inorganic Chemicals Manufacturing Point Source Category) is set out in pertinent part at Pet. App. 1-d to 37-d. See also Pet. App. 6-b to 7-b.

³Petitioners also contended that there was no adequate evidence in the record to support the regulations.

⁴Section 304(b) is set out at Pet. App. 7-c to 9-c.

⁵In short, as the district court stated (Pet. App. 7-b), petitioners "contend that the word 'guidelines' in Section 304(b) is a term of art which contemplates the administrative promulgation of broadly outlined regulations to serve as a starting point for the development of specific restrictions which would then be individualized for each discharger by way of permits issued by the Regional Administrator or State pursuant to Section 402, with such permits embodying the 'limitations' to be 'achieved' pursuant to [Section] 301."

regulations was the district court, not the court of appeals, since Section 509(b) of the Act (33 U.S.C. (Supp. IV) 1369 (b)) conferred exclusive jurisdiction upon the courts of appeals to review only the Administrator's action under Sections 301, 302, 306, 307 and 402 of the Act (see Pet. App. 8-b to 9-b). The EPA Administrator, disagreeing with petitioners' interpretation, contended that only the court of appeals had jurisdiction because his action in promulgating the challenged regulations was properly based, in part, upon Section 301(b) of the Act.

The district court granted the Administrator's motion to dismiss for lack of jurisdiction. It held that the Act authorized EPA to promulgate effluent limitations under Section 301(b), that the regulations in question were in fact promulgated pursuant to Section 301(b), and that exclusive jurisdiction to review such regulations is vested in the courts of appeals by Section 509(b)(1)(E) of the Act, 33 U.S.C. (Supp. IV) 1369(b)(1)(E). Because of the interrelationship between Section 301 effluent limitations and Section 304 guidelines, the court further stated that petitioners' attack on the Section 304(b) guidelines was "in essence a challenge to the Administrator's action in promulgating effluent limitations under Section 301 and must be pursued under Section 509(b)(1)(E) in the Court of Appeals" (Pet. App. 16-b).

Petitioners' appeal to the Fourth Circuit (hereinafter "*du Pont I*") was consolidated for briefing and argument with protective petitions for review that had also been filed in the court of appeals, pursuant to Section 509(b)(1)(E), by petitioners and by six additional chemical manufacturers not parties to the district court action (hereinafter, "*du Pont II*"). The petitions for review challenged the same sulfuric acid regulations that were involved in the district court action, as well as similar

regulations applicable to ten other inorganic chemical products.

On December 30, 1975, the court of appeals affirmed the district court's dismissal of *du Pont I* for lack of jurisdiction (Pet. App. 1-a to 12-a). Unlike the district court, the court of appeals viewed the jurisdictional question and the question of the EPA Administrator's authority to issue the regulations under Section 301(b), as separate and distinct. The court of appeals held that it need not decide the question of the Administrator's statutory authority in order to decide the jurisdictional question (Pet. App. 9-a). It reasoned that even if petitioners were correct in their view that the Administrator may not promulgate effluent limitations under Section 301(b), the guidelines he concededly must promulgate under Section 304(b) are a necessary key to the attainment of the goals set forth in Section 301. Thus, the court held that "any action taken by the Administrator under [Section] 304(b) should properly be considered to be pursuant to the provisions of [Section] 301 and, therefore, reviewable by this court under [Section] 509" (Pet. App. 11-a).

After the filing of the instant petition for a writ of certiorari, the court of appeals, on March 10, 1976, decided the merits of the proceedings in *du Pont II* before it under Section 509(b)(1)(E).⁶ (A copy of this decision is being lodged herewith.)

⁶In *du Pont II*, the court sustained the general validity of the regulations. It held that regulations controlling effluents may be issued by the Administrator under a combination of the authority conferred in Sections 301 and 304. In the interests of national uniformity, such regulations are presumptively valid, but they must provide a procedure for permitting individual variances, modifications and exceptions for both existing plants and new sources. In regard to the particular regulations applicable to more than one

2. As petitioners point out (Pet. 15-21), the questions presented here have been considered by five courts of appeals, including the court below. Although their reasoning differs, three circuits are in agreement with the decision here that the courts of appeals have exclusive jurisdiction to review the Administrator's regulations governing effluent discharges from existing plants. *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442 (C.A. 7); *American Petroleum Institute v. Train*, 526 F.2d 1343 (C.A. 10); *American Iron and Steel Institute v. Environmental Protection Agency*, 526 F.2d 1027 (C.A. 3) (by implication). One court of appeals has reached the opposite conclusion. *CPC International, Inc. v. Train*, 515 F.2d 1032 (C.A. 8).

There is thus a conflict among the circuits on important questions under the Federal Water Pollution Control Act Amendments, which may involve not only the jurisdictional issues, but also issues concerning the Administrator's authority to promulgate uniform national effluent limitations under Section 301(b) of the Act. Whether the Administrator has such authority, which is the second question presented in the petition, was not decided by the court below in this case because of its conclusion that even if the Administrator could not act under Section 301(b), the court of appeals nevertheless had exclusive jurisdiction to review the regulations.⁷ Since we agree with this approach to the jurisdictional

sub-category of effluent, the court set aside portions of the regulations dealing with "process waste water" and "process waste water pollutants," and with "catastrophic rainfall." The court also set aside portions of particular regulations dealing with eleven chemical products.

⁷As we noted above, in *du Pont II* the court reached this issue and determined that the Administrator had authority under Section 301(b).

issue, we believe that this Court need not decide the question concerning the Administrator's authority. Nevertheless, this question, as well as the first and third raised in the petition, is properly presented since petitioners have contended throughout that in order to decide whether the court of appeals has exclusive jurisdiction under Section 509, it must first determine whether the Administrator had authority under Section 301, which petitioners claim he did not.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.